

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No.: EB-09-SE-086
Scottsdale Lexus)	NAL/Acct. No.: 201132100022
)	FRN: 0020536694

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 26, 2011**Released: January 26, 2011**

By the Acting Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find Scottsdale Lexus apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000) for apparent willful and repeated violation of section 301 of the Communications Act of 1934, as amended (“Act”),¹ and sections 1.903(a) and 95.3 of the Commission’s rules (“Rules”).² The noted apparent violations involve Scottsdale Lexus’s operation of a General Mobile Radio Service (“GMRS”) radio system without Commission authority.

II. BACKGROUND

2. The GMRS is a “land mobile radio service available to persons for short-distance two-way communications to facilitate the activities of licensees and their immediate family members.”³ The party responsible for any GMRS station must obtain a license prior to transmitting on any channel authorized in the GMRS,⁴ and only individuals are currently eligible to obtain, renew, and modify GMRS systems.⁵

3. The Enforcement Bureau’s Spectrum Enforcement Division (“Division”) received a complaint alleging that Scottsdale Lexus, an automobile dealership, was operating GMRS equipment at its business address in Scottsdale, Arizona, without a Commission license. On January 28, 2010, the Division issued a letter of inquiry (“LOI”) to Scottsdale Lexus.⁶

¹ 47 U.S.C. § 301.

² 47 C.F.R. §§ 1.903(a), 95.3.

³ 47 C.F.R. § 95.1(a).

⁴ 47 C.F.R. § 95.3.

⁵ 47 C.F.R. § 95.5(a).

⁶ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Tracy D. Moorman, General Manager, Scottsdale Lexus (January 28, 2010).

4. In its February 26, 2010 response to the LOI,⁷ Scottsdale Lexus stated that it was unaware that it needed a license to operate the handheld mobile units it was using among its employees until it received the Bureau's LOI.⁸ Scottsdale Lexus stated that it purchased 46 mobile units on or about March 31, 2009 "for communications by and between employees of the dealership on the property only," and distributed the units to employees in early April 2009.⁹ Scottsdale Lexus identified the mobile units as Midland Radio model number GXT720VP3 36-channel GMRS/Family Radio Service¹⁰ two-way radios.¹¹ The owner's manual for these mobile units states the "GXT720/775 Series operates on GMRS (General Mobile Radio Service) frequencies which require an FCC (Federal Communications Commission) license. You must be licensed prior to operating on channels 1 – 7 or 15 – 36, which comprise the GMRS channels of the GXT720/775 Series."¹² Scottsdale Lexus admitted that between April 2009 and January 28, 2010, it operated the radios on channels 1 - 7.¹³ Scottsdale Lexus also asserted that it immediately stopped using the radios on January 28, 2010, when it received the Division's LOI.¹⁴

II. DISCUSSION

5. Section 301 of the Act and section 1.903(a) of the Rules prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by radio except under, and in accordance with, a Commission granted authorization.¹⁵ Section 95.3 of the Rules requires that, before any station transmits on any channel authorized in the GMRS, the responsible party obtain a license from the FCC.¹⁶ Additionally, under section 95.5(a) of the Rules, only individuals are currently eligible to obtain, renew, and modify GMRS systems.¹⁷

6. Scottsdale Lexus admitted in its LOI Response that it operated its mobile units on GMRS channels without Commission authority in connection with day-to-day operations at its dealership in Scottsdale, Arizona from early April 2009 until January 28, 2010, when the Division sent Scottsdale Lexus an LOI. By operating the mobile units on the GMRS channels without a license, Scottsdale Lexus

⁷ See Letter from Tracy D. Moorman, General Manager, Scottsdale Lexus, to Katherine Power, Attorney Advisor, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (February 26, 2010) ("LOI Response").

⁸ See LOI Response at 2.

⁹ *Id.* at 1-2.

¹⁰ The Family Radio Service ("FRS") is a private, two-way, very short-distance voice and data communications service for facilitating family and group activities. See 47 C.F.R. § 95.401(b). No license is required to operate FRS radios. 47 C.F.R. § 95.191.

¹¹ LOI Response at 1. These radios are certified under FCC Identification Number MMAGXT775.

¹² See Midland X-TRA Talk, GXT720/775 Series GMRS/FRS Radio Owner's Manual, p. 4.

¹³ See LOI Response at 2.

¹⁴ *Id.* See also E-mail from Tracy Moorman, General Manager, Scottsdale Lexus, to Larry Bockius, Jim DeBoy, Doug Payne, et al. (January 28, 2010, 4:50 PM) (directing the immediate discontinuance of hand held "walkie/talkie" operation by staff on channels 1-7 and 15-36).

¹⁵ 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

¹⁶ 47 C.F.R. § 95.3.

¹⁷ 47 C.F.R. § 95.5(a). See also 47 C.F.R. § 95.5(b), (c).

apparently willfully¹⁸ and repeatedly¹⁹ violated section 301 of the Act and sections 1.903(a) and 95.3 of the Rules.²⁰ Moreover, we note that as a business entity, Scottsdale Lexus is not even eligible to obtain a GMRS license.

7. Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²¹ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²² The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²³ Under this standard, we conclude that Scottsdale Lexus is apparently liable for a forfeiture for its apparent willful and repeated operation on GMRS channels without Commission authorization.

8. In determining the appropriate forfeiture amount, section 503(b)(2)(E) of the Act directs us to consider factors, such as “the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁴ As we explain below, having considered the statutory factors, we propose a forfeiture of \$10,000.

¹⁸ Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, Memorandum Opinion and Order, 7 FCC Rcd 3454 (1992) (“*Southern California*”); *see also Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237 (2008); *Regent USA*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10520, 10523 (2007) (forfeiture paid); *San Jose Navigation, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 2873 (2006), *forfeiture ordered*, Forfeiture Order, 22 FCC Rcd 1040 (2007), *consent decree ordered*, Order and Consent Decree, 26 FCC Rcd 1494 (2010).

¹⁹ Section 312(f)(2) of the Act, which also applies to forfeitures assessed pursuant to section 503(b) of the Act, provides that “[t]he term ‘repeated,’ ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2). *See Callais Cablevision, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 (2001), *forfeiture ordered*, Forfeiture Order, 17 FCC Rcd 22626 (2002); *Southern California*, 6 FCC Rcd at 4388.

²⁰ We note that Scottsdale Lexus has stated in its LOI Response that it “did not consciously or deliberately violate any FCC rule or law” as it was purportedly unaware of the requirement to obtain a license. However, in the forfeiture context, “willful” does not require a finding that the rule violation was intentional or that the violator was aware that it was committing a rule violation. Rather, the term “willful” means that the violator knew that it was taking the action in question, irrespective of any intent to violate the Rules. *See Southern California*, 6 FCC Rcd at 4387. *See also Saga Communications of New England, L.L.C.*, Memorandum Opinion and Order, 24 FCC Rcd 3289, 3291 (Enf. Bur. 2010); *Five Star Parking d/b/a Five Star Taxi Dispatch*, Forfeiture Order, 23 FCC Rcd 2649, 2651 (Enf. Bur., Spectrum Enf. Div. 2008).

²¹ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²² 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²³ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

²⁴ 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

9. Section 1.80(b)(4) of the Rules sets a base forfeiture amount of \$10,000 for operation of a radio station without Commission authority.²⁵ Based on the record in this proceeding, we propose a forfeiture of \$10,000 for Scottsdale Lexus's unauthorized operations.

10. We note that the base forfeiture amount is subject to adjustment, either upward or downward. Here, however, we find no basis for any downward adjustment.²⁶ For example, Scottsdale Lexus asserted in its LOI Response that because it was unaware of the requirement to obtain a license, it did not "consciously or deliberately violate any FCC rule." Lack of specific intent to violate Commission rules (even based on a lack of knowledge) is not a mitigating factor that warrants a downward adjustment.²⁷ Moreover, as noted above, the owner's manual for the devices at issue states prominently that operation requires an FCC license, and that "serious penalties could result for unlicensed use of GMRS channels." Thus, Scottsdale Lexus certainly should have known that a license was required. In addition, the fact that the company was not even eligible to obtain such a license could be viewed as an aggravating factor. Furthermore, Scottsdale Lexus's claim in its LOI Response that it was unaware of any public harm caused by its improper use of the mobile units is unavailing. It is well-established that the absence of harm is not considered a mitigating factor warranting a downward adjustment of a forfeiture.²⁸ Finally, Scottsdale Lexus's assertion that it has not had any other issue with, or inquiry regarding, FCC rules or licensing over the past 15 years does not warrant any reduction of the proposed forfeiture. While the Commission recognizes history of overall compliance as a downward adjustment factor,²⁹ there is no evidence in the record that Scottsdale Lexus has ever held an FCC license or authorization, and Scottsdale Lexus was apparently out of compliance with FCC rules for the entire ten-month period between April 2009 and January 2010 when it operated equipment subject to the FCC's jurisdiction. Thus, Scottsdale Lexus does not appear to have any history of compliance with the FCC's rules.³⁰ Accordingly, we propose a \$10,000 forfeiture.³¹

²⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113, *recon. denied*, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement"); 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section I. Base Amounts for Section 503 Forfeitures.

²⁶ See 47 C.F.R. § 180(b)(4) Note to Paragraph (b)(4); Section II. Adjustment Criteria for Section 503 Forfeitures, Downward Adjustment (minor violation; good faith or voluntary disclosure; history of overall compliance; and inability to pay).

²⁷ See *Profit Enterprises, Inc.*, 8 FCC Rcd 2846, 2846 (1993) (denying the mitigation claim of a manufacturer/distributor who thought that the equipment certification and marketing requirements were inapplicable, stating that its "prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed ... ignorance of the law is [not] a mitigating factor"); *Bureau D'Electronique Appliquee, Inc.*, Forfeiture Order, 20 FCC Rcd 17893, 17896-7 (Enf. Bur., Spectrum Enf. Div. 2005) (denying the mitigation claim of a manufacturer/distributor who admitted that "lack of actual knowledge" may not negate a finding of willfulness, but that such factors[s] warranted a downward adjustment of the proposed forfeiture amount).

²⁸ See *Liberty Cable Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16105, 16113 (2001); *Pacific Western Broadcasters, Inc.*, Memorandum Opinion and Order, 50 FCC 2d 819, 819 (1975); *AGM-Nevada, LLC*, Forfeiture Order, 18 FCC Rcd 1476, 1478-9 (Enf. Bur. 2003); *Bureau D'Electronique Appliquee, Inc.*, 20 FCC Rcd at 17898.

²⁹ 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

³⁰ See *Odino Joseph*, Forfeiture Order, 18 FCC Rcd. 16522 (Enf. Bur. 2003) (finding that a radio broadcaster who is not a Commission licensee, could not have "any history with the Commission upon which a history of overall compliance could be based," and therefore was not entitled to a downward adjustment).

³¹ While section 503(b)(6) of the Act bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an NAL, we may consider the fact that Scottsdale Lexus's misconduct occurred over a period of almost a year (between April 2009 and January 2010) to place "the violations in context, (continued....)

11. Based on the foregoing, we find Scottsdale Lexus in apparent willful and repeated violation of section 301 of the Act and sections 1.903(a) and 95.3 of the Rules for apparently operating a GMRS system without Commission authority. Therefore, Scottsdale Lexus is apparently liable for a forfeiture in the amount of \$10,000.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act³² and sections 0.111, 0.311 and 1.80 of the Rules,³³ Scottsdale Lexus **IS** hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for the willful and repeated violation of section 301 of the Act and sections 1.903(a) and 95.3 of the Rules.

13. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Rules,³⁴ within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture*, Scottsdale Lexus **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer – Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Scottsdale Lexus will also send electronic notification to Katherine.Power@fcc.gov and Ricardo.Durham@fcc.gov on the date said payment is made.

15. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules.³⁵ The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The statement must also be emailed to Katherine Power at Katherine.Power@fcc.gov and Ricardo Durham at Ricardo.Durham@fcc.gov.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3)

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thus establishing the licensee’s degree of culpability and the continuing nature of the violations.” *Roadrunner Transportation Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-72 (2000). The forfeiture amount we propose herein relates only to Scottsdale Lexus’s apparent violations that have occurred within the past year.

³² 47 U.S.C. § 503(b).

³³ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

³⁴ 47 C.F.R. § 1.80.

³⁵ 47 C.F.R. §§ 1.80(f)(3) and 1.16.

some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by first class mail and certified mail return receipt requested to Tracy Moorman, General Manager, Scottsdale Lexus, 6905 East McDowell Road, Scottsdale, Arizona 85257.

FEDERAL COMMUNICATIONS COMMISSION

Ricardo M. Durham
Acting Chief
Spectrum Enforcement Division
Enforcement Bureau